92 I.A.2/5

51286

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES DORSEY a/k/a JAMES DORESY, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant was indicted for the offense of theft from the person and found guilty in a jury trial, after which the trial judge sentenced the defendant to the Illinois State Penitentiary for a term of not less than 4 years nor more than 10 years. The only point raised on appeal is that the sentence imposed should be reduced.

The facts brought out at the trial are that Gary Hill, a policeman for the Chicago Transit Authority, on duty in a C T A subway station located at Grand and State in Chicago, on September 2, 1965, at approximately 4:00 A. M., observed a man sleeping on a bench on the platform. He observed the defendant approach the sleeping man after alighting from a northbound train, and after walking about the platform sit down on the bench to the right of the sleeping man. The defendant patted the victim down and removed the victim's wallet from his rear pocket. The defendant also tried to remove the watch from the victim's wrist, at which time the policeman approached the defendant, who thereupon threw the wallet onto the tracks and ran. The defendant was apprehended by a partner of Hill. The wallet was recovered and found to contain no currency. The victim related that he had no money in his wallet prior to the offense. The defendant denied committing the offense.

A hearing in aggravation and mitigation was conducted by the court. In aggravation it was pointed out that appellant had a prior criminal record, three convictions for robbery, each resulting in a prison sentence, the first in 1928, in the reformatory; in 1932 in the penitentiary and in 1942 in the penitentiary. The record showed that since his release from his last prison term in 1948 the defendant had been arrested several times and spent time in the House of Correction in 1960 for drug addiction (an offense no longer a crime), and a year in the House of Correction in 1962 for petty theft. The court thereupon sentenced the defendant to the Illinois State Penitentiary for a term of not less than 4 years nor more than 10 years.

During the hearing in aggravation and mitigation the defendant asked the court to take into consideration that he was 59 years of age, that he had stayed out of the penitentiary since 1948, that he had a low income, that he once became addicted to narcotics, but was no longer an addict, and that he had a son serving in Viet Nam. The penalty proscribed by statute for the offense of which the defendant was convicted is not less than one year and not more than ten years. (Ill. Rev. Stat. 1965, chap. 38, par. 16-1.)

In People v. Smith, 14 Ill. 2d 95, 97, the court said:

> "The defendant contends that his sentence is excessive, and does not claim that the term fixed is unauthorized by statute or that his constitutional rights have been violated. We have held that the nature, character and extent of the penalties for a particular criminal offense are matters for the legislature, which may prescribe definite terms of imprisonment, or specific amounts as fines or fix the minimum and maximum limits thereof. Where it is contended that the punishment imposed in a particular case is excessive, though within the limits prescribed by the legislature, this court should not disturb the sentence unless it clearly appears that the penalty constitutes

> a great departure from the fundamental law and its spirit and purpose, or that the penalty is manifestly in excess of the proscription of section 11 of article II of the Illinois constitution which requires that all penalties shall be proportioned to the nature of the offense. People v. Dixon, 400 Ill. 449; People v. Mundro, 326 Ill. 324; People v. Lloyd, 304 Ill. 23; People v. Elliott, 272 Ill. 592."

In People v. Schmidt, 10 Ill. 2d 221, 229, the court said:

> "In passing sentence upon a guilty criminal the trial judge is invested with judicial discretion within the limits of punishment fixed by law. If that discretion has not been abused and if the prisoner at the bar has not been materially prejudiced by the procedure which the court adopts in conducting the inquiry required by the Criminal Code this Court will not interfere with the judgment pronounced. People v. Riley, 376 Ill. 364."

In the case before us there is no complaint that the prisoner had been materially prejudiced by the procedure adopted or pursued by the court in the conduct of the inquiry as to aggravation and mitigation.

In the case at bar the offense involved a trespass against a person who was sleeping. The defendant's own record of previous convictions and confinements in the penitentiary and the reformatory, as well as in the House of Correction, has not shown an inclination to alter or change from a life of crime.

It was pointed out in the case of People v. Johnson, 68 Ill. App. 2d 275, that if the sentence is within the statutory limits, as in the present case, the sentence should not be changed because a reviewing court would have imposed a different penalty, or for mere judicial clemency. Under the present statute, authorizing reviewing courts to reduce sentences where circumstances warrant, such authority should be applied with considerable caution and circumspection, for the trial judge ordinarily has a superior

opportunity in the course of the trial and the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than do the appellate tribunals. People v. Taylor, 33 Ill. 2d 417.

Since the sentence imposed is within the statutory limits and is not excessive, we do not believe that the sound discretion of the trial court should be interfered with.

JUDGMENT AND SENTENCE AFFIRMED

DEMPSEY, P. J. and SCHWARTZ, J. concur.

No. 50713

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY,
	)	CRIMINAL DIVISION.
SAMUEL FOSTER, otherwise called CHARLES PETE, Defendant-Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Samuel Foster was indicted for robbery and rape, tried without a jury, found guilty of both offenses and sentenced to serve concurrent fifteen to thirty year terms in the State Penitentiary. He takes this appeal, contending (1) that the State did not establish beyond a reasonable doubt that the crimes charged were in fact committed; (2) that the State did not establish beyond a reasonable doubt that the defendant was the man who committed the alleged crimes; and (3) that the sentences imposed were excessive. A summary of the evidence adduced at the trial follows.

Mrs. Virginia Williams testified that at 8:00 a.m. on August 19, 1964, as she was leaving her home at 6553 South Carpenter Street in Chicago to go to work, she was stopped on the street by a stranger whom she later identified as the defendant. He asked her for a cigarette and then asked where her husband was. She replied that he was at work and she attempted to walk away, but was pulled back by defendant who said, "That is all I wanted to know." He ordered her to come with him, threatening that if she screamed, he would kill her. She could not see whether he had a gun, but he stuck something in her side through his coat. He said he wanted her money and

she told him he could have it right there because she only had two or three dollars. He said, "Bitch, I am running the show; you do as I tell you or I'll kill you." He pulled her up against himself and forced her to walk around the corner, into an alley and under a flight of stairs. She said she saw no one in the area during the occurrence. While under the stairs the defendant told her to drop her money, which she did, and he picked it up. He tried to kiss her and when she attempted to turn her head away he said, "You don't like that, do you, bitch?" He started to unbutton her blouse and told her to unfasten her brassiere, but she refused, telling him to do so. The defendant exposed himself and told her to lie down, but she objected, saying she would get her skirt dirty. He raised her skirt, pushed her panties aside and inserted his penis in her vagina. He then withdrew himself and ordered her to take off her clothes and lie down. Mrs. Williams testified that she saw a steel bar lying on the ground and told the defendant if he wanted her to disrobe, he would have to turn and step back. She proceeded as if she were taking off her clothes, but instead she reached down, grabbed the bar and struck the defendant with it. He grabbed the bar from her and struck her with it about ten times. At that point a woman in the alley screamed at him to stop, and he ran away. The woman took Mrs. Williams into her house, where they called the police.

When the police arrived, they took Mrs. Williams to the place where she said she had been raped and found her underwear and a steel bar. She was taken to the hospital and then to the police station. At the station she viewed photographs along with Sharon Carter, another girl who had been attacked that morning in the same area. They each identified a picture of the

defendant as that of the assailant. On August 25th, Mrs. Williams returned to the station and picked the defendant out of a lineup of five male Negroes.

Four Chicago police officers testified that immediately after the crime Mrs. Williams' face was badly bruised and her left eye was "cherry red." They also said that her underclothes and the steel bar were found at the scene of the crime; that she identified the defendant from police slides and that she picked him out of the police lineup.

Defendant testified that he lived with Oscar and Gladys Finner at 6128 South Sangamon Street in Chicago. He denied committing the crimes and attempted to account for his time on the morning of August 19, 1964. He testified that he got up at 7:15 a.m. and left the house about 7:45. He crossed the street to his uncle's home at 6123 South Sangamon Street, saw his uncle for a few minutes and proceeded to 6358 South Peoria Street, where a friend lived. There he saw Mrs. Patti Weems and her two sons John and Oliver. He stayed ten or fifteen minutes, left with Oliver and rode around in Oliver's car for about an hour. He returned to his uncle's home at about 9:00 a.m. The defense called nine witnesses to corroborate part of the defendant's alibi.

Gladys Finner stated that defendant after staying at her house all night left between 7:35 and 7:45 in the morning. Her husband said he heard defendant get up at about 7:00 a.m. Her daughter Dorothy said she saw the defendant leave at about 7:45 a.m. Leon Carver who also lived with the Finners saw the defendant at 7:30. Defendant's uncle Johnny Foster testified that the defendant stopped at his house for four or five min-

utes between 7:30 and 8:00 a.m. and that he returned at about 9:00 a.m. A neighbor of Mr. Foster, C. Wilks, testified that he saw the defendant some time between 7:00 and 8:00 a.m. at his uncle's home. Oliver Weems testified that the defendant arrived at his house between 7:30 and 8:00 on the morning of the crime; that they were at his house about a half hour and then drove around in his car until 9:00 a.m. or later, at which time he dropped the defendant off at his uncle's house. Patti Weems and John Weems also testified that the defendant arrived at their house between 7:30 and 8:00 a.m.

In rebuttal, the State called police officer William O'Connor who testified that on August 25, 1964, Patti Weems had told him the defendant had not stopped by at her house until 10:00 or 11:00 a.m. and also called officer Leo Wilkosz who testified that Mrs. Weems told him on September 25, 1964, that it was 8:30 when the defendant arrived at her home. The State also called Sharon Carter who testified that on the morning of the crime she had seen defendant from 7:45 to 7:55 a.m. at 6500 South Aberdeen Street, only about a block from the scene of the crime.

The trial judge stated specifically that he believed the State's witnesses who placed defendant at the scene of the crime at 8:00 a.m. and that he did not believe the contradictory testimony of defendant's friends.

Defendant contends first that the evidence failed to establish beyond a reasonable doubt that the crimes charged were in fact committed. He contends that the testimony is insufficient to prove that the act of intercourse was accomplished by force and against the victim's will. He correctly states that for a conviction of rape to stand, the evidence must show

that the act was committed by force and against the will of the female. Ill. Rev. Stat., ch. 38, §11-1 (1965); People v. Thomas, 18 Ill. 2d 439, 164 N.E.2d 36. There need be no showing of resistance by the female however where hesitance would be futile and would endanger her life. Neither need the use of physical force be shown if the prosecuting witness was paralyzed by fear or overcome by the superior strength of her attacker. People v. Faulisi, 25 Ill. 2d 457, 185 N.E.2d 211; People v. Williams, 23 Ill. 2d 295, 178 N.E.2d 372. In the instant case a reading of the testimony of Mrs. Williams, which was uncontradicted, reveals no evidence of consent on her part. The defendant twice threatened to kill her if she resisted and at least led her to believe he had a gun in his pocket. It was apparent to Mrs. Williams that any resistance on her part would have been futile and indeed would have endangered her life. As a matter of fact, she did more to resist than one would expect under the circumstances, inasmuch as she picked up a steel pipe at her first opportunity and struck the defendant. The danger and futility of resisting defendant's advances was demonstrated immediately when he took the pipe from her and beat her with it. Mrs. Williams' testimony was corroborated by the police officers who witnessed her condition after the beating and found the steel pipe at the scene of the crime. All the elements of the crime of rape were proved beyond any doubt.

Defendant's second contention is that the State failed to establish his identification beyond a reasonable doubt. He argues that the identification testimony was insufficient to establish his presence at the scene of the crime in view of the alibi he established with the corroboration of nine witnesses. We cannot agree with this. The defendant was positively identi-

fied by Mrs. Williams. She first picked his picture from several hundred slides at the police station and later picked him out of a lineup of five male Negroes. He was also identified by Sharon Carter who picked his picture from the same group of slides. She testified that she had seen him between 7:45 and 7:55 on the morning of August 19, 1964, only a block away from where Mrs. Williams testified she was accosted. This conflicts with the testimony of only three of the defendant's nine alibi witnesses. The testimony of six of the witnesses whom he called to corroborate his alibi was not inconsistent with the victim's testimony. The scene of the crime was only five or six blocks from the block in which the Finners and defendant's uncle lived. None of the six witnesses who testified to the time he left the area stated that he definitely was there after 7:45 or before 9:00 a.m. The testimony of the other three witnesses, Mrs. Weems and her two sons, is irreconcilable with Mrs. Williams' and Miss Carter's testimony. Mrs. Weems however was impeached by the testimony of two police officers who stated she had told them on one occasion that the defendant arrived at her home at 10:00 or 11:00 a.m. and on another occasion that he arrived at 8:30 a.m. Her two sons were close friends of the defendant and their testimony was also contrary to the statement their mother had earlier made to the police officers. The trial judge as trier of the facts rejected the testimony of these three witnesses and chose to believe the victim and Miss Carter. The credibility of a witness is best determined by the trier of fact who has heard and seen the witnesses. There is ample evidence to support the court's finding that defendant was guilty beyond a reasonable doubt.

Defendant's third contention is that the sentences imposed were excessive. It is our opinion that the court did not abuse its discretion by sentencing the defendant to a term of fifteen to thirty years for the rape conviction. People v. Stevens, 68 Ill. App. 2d 265, 215 N.E.2d 147. The sentence was within the limits prescribed by the legislature and was not manifestly in excess of that dictated by the spirit and purpose of the fundamental law. People v. Smith, 14 Ill. 2d 95, 150 N.E.2d 815; People v. Miller, 33 Ill. 2d 439, 211 N.E.2d 708.

The court erred however in imposing a fifteen to thirty year term for the robbery conviction. The Criminal Code provides for a maximum term of twenty years for robbery. Ill. Rev. Stat., ch. 38, §18-1(b) (1965). Pursuant to Supreme Court Rule 615 we may reduce the sentence imposed by the trial court. Ill. Rev. Stat., ch. 110A, §615 (b) (4) (1967). We conclude from the record that an appropriate sentence for defendant's conviction on the charge of robbery would be a term of not less than fifteen years nor more than twenty years, and the defendant's sentence on that charge is reduced accordingly.

JUDGMENT AFFIRMED WITH REDUCED SENTENCE.

DEMPSEY, P.J. and SULLIVAN, J. concur.

No.51819

92 I.A.2-27

MARY M. HIGGIN, Plaintiff-Appellee,	)	
	)	APPEAL FROM THE
v.	)	CIRCUIT COURT OF
	)	COOK COUNTY.
LENORE E. HIGGIN, Defendant-Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a suit in chancery, alleging that she was the equitable owner of an undivided 4/11ths interest in an apartment building at 2714-18 North Mildred Avenue, Chicago, title to which was in the names of her son John E. Higgin (now deceased) and her daughter-in-law Lenore Higgin as joint tenants; that she had contributed $4000 toward the purchase price pursuant to an agreement with said John and Lenore Higgin, and praying for an accounting of rents and for the imposition of a purchase money resulting trust in her favor to the extent of her contribution. The chancellor found for plaintiff and ordered defendant to convey a 4/11ths interest to the plaintiff, to account for receipts and disbursements and to pay a proportionate share of the proceeds to plaintiff.

Defendant appeals from the decree, contending that the plaintiff had an adequate remedy at law; that equity is "without jurisdiction to create a trust, order an ordinary [sic] accounting, require a conveyance or to determine title of land"; and that the court erred in admitting parol evidence as to the intention of the parties. Defendant's other contentions relate to the sufficiency of the evidence. The facts follow.

Plaintiff Mary Higgin, a 76 year old widow, lived in a second floor apartment above the apartment of her son John

and his wife Lenore. On January 10, 1961, John told his mother the property next door was for sale and he wanted to buy it. Plaintiff testified that her son asked her for a loan for the purpose of buying the adjacent property, but that she refused to provide funds for its purchase unless she were given a part interest.

The property was being offered for sale at $11,000, and plaintiff said she could raise $4000 of the purchase price. She stated she wanted a proportionate 4/11ths interest in the profits. Subsequent to that conversation plaintiff gave her son a check for $500 and another check for $3500. The property was purchased and transferred by deed to John Higgin and his wife Lenore, who is the defendant in this action. During this time the plaintiff told her son she "wanted a paper or something to show that [she] had an interest in it...." In response to her request John gave her a piece of paper in his handwriting, signed by himself and his wife, stating, "We, Lenore and John E. Higgin, owe to Mary M. Higgin the sum of $4,000.00 received as earnest money, to purchase 4/11 property located at 2714 N. Mildred Ave. from them following their purchase of property."

Plaintiff testified that her son came home later that day and said, "Well, we have the property. Mom, do you want to keep the books?" She told him she would rather have him keep them, and he stated he would get two sets of books, so that he could keep one for himself and one for her. It is undisputed that from the time the property was purchased until John Higgin's death on July 26, 1965, he collected the rents from the property, made the necessary repairs and expenditures for its upkeep, and divided the profits in a ratio of 4/11ths to his mother and 7/11ths to himself. The rent

receipt book kept by John Higgin was introduced into evidence and showed that he had entered in it all rent receipts, had itemized all expenses and had listed "dividend" payments every three months to himself and his mother as follows:

> "...2. Dividends Feb.-Mar.-April - $220.00
> Mary M. Higgin 4/11 - $80.00 /s/ Mary M. Higgin
> John E. Higgin 7/11 -$140.00 /s/ John E. Higgin."

Plaintiff testified that shortly after her son's death the defendant came to her and said they would continue to run the apartment rental just as when her husband was alive. Defendant denies that portion of the plaintiff's testimony, but admits giving plaintiff a check for $80.00 on October 1, 1965.

Leonard Higgin, plaintiff's other son, testified to a conversation he had with his brother concerning the property. He stated he had no doubt that his mother and brother owned the property in partnership and testified his brother had told him about the partnership. Plaintiff's son-in-law Charles Booth testified he had heard Mary Higgin say in John Higgin's presence that she owned 4/11ths of the property, and Higgin said nothing. Higgin's daughter Joyce testified that her father had explained to her that he and his mother had gone into partnership in buying the property. John Volkman, a certified public accountant, testified he helped plaintiff make out her 1961 income tax return and discussed the tax implications of the partnership with John Higgin. They agreed that the plaintiff should include 4/11ths of all income and expenses in her tax return and 4/11ths of the depreciation.

After hearing the foregoing evidence, the chancellor found that plaintiff and her son and his wife had entered into an agreement by which plaintiff agreed to contribute 4/11ths of

the purchase price of the property and her son and daughter-in-law had agreed to pay the remainder; that plaintiff was to receive an interest in the property; that plaintiff paid her share of the purchase price; that John and Lenore Higgin executed a statement on January 20, 1961, as evidence of the plaintiff's interest in the property; that a deed to the property was executed to John and Lenore Higgin; that since the purchase of the property, John and Lenore Higgin held legal title thereto, subject to a resulting trust for a 4/11ths interest in favor of plaintiff. Upon this finding the chancellor ordered the defendant to convey the 4/11ths interest in the property to the plaintiff and further ordered her to account to plaintiff for her share of the net proceeds derived from the operation of the property.

Counsel for defendant appears to misapprehend the functions of a court of equity. He is further confused by the distinction between the law of trusts and the law of contracts. Where a transfer of property is made to one person and the purchase price is paid by another, the law presumes that the parties intended a resulting trust in favor of the person by whom the purchase price or a portion thereof is paid. Prassa v. Corcoran, 24 Ill. 2d 288, 181 N.E.2d 138; Scanlon v. Scanlon, 6 Ill. 2d 224, 127 N.E.2d 435; Clark v. Clark, 398 Ill. 592, 76 N.E.2d 446; 2 Restatement, Trusts, 2nd, §§440, 442, 443, 454; 4 Scott, Trusts, §440 (2nd ed., 1956). Resulting trusts of this type were judicially recognized for many years prior to the enactment of the Statute of Frauds in the seventeenth century. Shortly after adoption of the statute, it was held in chancery that a purchase money resulting trust was excepted from its application. Anonymous, 2 Vent. 361 (1683). The existence of such trusts is customarily proven by parol.

Counsel for defendant contends that "[e]quity is without jurisdiction to create a trust, order an ordinary [sic] accounting, require a conveyance or to determine title of land." Contrary to the belief of counsel, the enumerated functions have been the hallmarks of equity courts since their inception in the reign of Henry II. Central Standard Life Ins. Co. v. Gardner, 17 Ill. 2d 220, 161 N.E.2d 278; Leonard v. Bye, 361 Ill. 185, 102 N.E. 546; Chapman v. Barton, 345 Ill. App. 110, 102 N.E. 565; Barger v. First National Bank, 310 Ill. App. 628, 35 N.E.2d 556.

Counsel also raises some question based on the parol evidence rule, but that is wholly inapplicable here.

The evidence was sufficient to raise the presumption that a resulting trust was created in favor of the plaintiff to the extent of a 4/11ths interest in the property and there was ample evidence to prove that a resulting trust was intended by the parties. A reviewing court will not reverse a chancellor's finding of fact unless it is contrary to the manifest weight of the evidence. Quist v. Streicher, 18 Ill. 2d 376, 164 N.E.2d 44; Urban v. Brady, 86 Ill. App. 2d 158, 230 N.E.2d 65. Accordingly, the decree is affirmed.

DECREE AFFIRMED

DEMPSEY, P.J. and SULLIVAN, J.
concur.

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51373

92 I.A. 3 32-1

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	
v.	)	Appeal from the Circuit Court of Cook County, Criminal Division.
HENRY RIZER, Appellant.	)	

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

Henry Rizer was indicted for robbery and aggravated battery. A jury acquitted him of the robbery charge but found him guilty of aggravated battery. After a hearing in mitigation and aggravation, which disclosed that he had been fined or sentenced to jail eight times for various misdemeanors, he was sentenced to the penitentiary for a term of one to six years.

Rizer contends that he was not proven guilty beyond a reasonable doubt and that he was denied access to a statement the complaining witness gave to the police.

Millard McLendon, 59 years old, testified that just before midnight on September 29, 1965, he left his home and drove to a package liquor store and bar on Roosevelt Road in Berwyn, Illinois, to purchase cigarettes. In order to avoid blocking a driveway to a gas station, he pulled his car up to the rear bumper of an auto parked in front of the store. As he returned to his car after making his purchase, he was intercepted by a man and a woman who accused him of damaging the auto parked ahead of his car and who demanded immediate payment for the damage. McLendon denied bumping into their auto and

he backed his own car up to show that there was no damage. He got out of his car and the argument continued. During it, the man bent him backward over the hood of his car, and after further argument, the woman pinned his arms behind his back and the man struck him in the face with such force that he was knocked to the pavement. He felt his wallet being taken from his pocket while he was down. His assailants entered their auto and as they drove away he wrote the auto's license number on a book of matches which he had in his pocket. He was taken to a hospital. His face and body were bruised, two of his teeth were broken and two of his ribs were cracked.

The defendant was arrested in December 1965 and identified by McLendon in a police line-up. At the police station and at his trial the defendant admitted being present at the altercation but said that he did not participate in it. He testified that he and his former wife were at the bar in the liquor store when someone told them that a parked car had been struck. His auto was parked in front of the store and his former wife left to investigate. When she did not return after having been gone ten minutes, he went out to see what was going on and found her arguing with McLendon. He said she was intoxicated and he considered McLendon, whom he never touched, to be so too.

The defendant maintains that the testimony of McLendon, the only witness to the battery, is unconvincing and creates a serious doubt of his guilt. In support of this he points out that McLendon said that he was hit only once but testified to multiple injuries;

that despite these supposed injuries McLendon walked back to the store and had a glass of beer while he was waiting for the police to arrive, and further, that it was highly improbable that the woman was so much stronger than McLendon that she could have held his arms behind his back and prevented him from breaking loose.

The jury and the trial court found nothing improbable or unconvincing in McLendon's testimony and neither do we. The woman could have been strong enough to have held him in the manner he described, he could have walked back to the tavern, and all his injuries may not have come from the blow. He could have been injured when he was bent backwards over the hood of his car and when he struck the pavement.

The defendant's last contention is that he was improperly limited in his cross-examination of McLendon by being denied access to a written statement McLendon gave to the police. When McLendon was asked whether he gave such a statement, he replied: "I think I did...; I'm not sure. I may have....I don't believe I did. I'm not sure...." His counsel asked if the State's Attorney had a statement and the latter answered, "There is none in existence...." The defendant's attorney said, "All right, I will take the State's Attorney's word for it."

Later, the police officer, who testified about McLendon's physical condition on September 30, 1965, said that he interviewed him on that date and wrote a report of the incident. From this the defendant infers that there was a statement by McLendon and that he was deprived of its use for impeachment purposes.

A report made by an investigating officer is not ipso facto in the words of a complaining witness or necessarily a substantially verbatim account of what the complainant may have said. The officer was not asked if McLendon signed the report or made a statement, or if the report was a transcription of what McLendon told him. No demand for the officer's report was made by the defendant's attorney and he did not ask that the prosecution produce the police file so that it could be examined by the court to determine whether it contained a report or statement. The prosecutor's good faith in denying the existence of a statement was not impugned, the existence of a statement was not established, the production of neither the statement nor the report was requested, and it was not incumbent upon the trial judge, without a request being made, to ascertain whether there was a statement. People v. Marshall, 74 Ill.App.2d 472, 221 N.E.2d 128 (1966). It must be concluded, therefore, that the defendant's trial counsel either knew that there was no statement in McLendon's own words or knowingly waived its production.

The judgment of the Criminal Division of the Circuit Court is affirmed.

Affirmed.

Schwartz and Sullivan, JJ., concur.

No. 51795

JOSEPH METOYER, Plaintiff-Appellant,	)	
v.	)	APPEAL FROM THE CIRCUIT COURT OF
NORALIE METOYER, Defendant-Appellee.	)	COOK COUNTY, COUNTY DEPARTMENT.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for divorce on the ground of desertion. The trial court found that the defendant had offered to return to the marital relationship prior to the expiration of the one year statutory period for desertion and dismissed the suit for want of equity. From that order the plaintiff appeals.

Plaintiff contends (1) that defendant's offer to return was an attempt to obtain temporary shelter and not a bona fide offer made in good faith to return to her marital status, and (2) that the court erred in refusing to permit plaintiff to amend his complaint to include adultery.

The parties were married in 1950. No children were born of the marriage. At the time of the separation on February 11, 1962, and for four years prior thereto the parties lived at 1123 North Mozart Street, Chicago, Illinois. Plaintiff testified that on February 11, 1962, he found his wife and one designated as "Frank," "her boy friend" in a room together. No evidence other than this bare fact is presented. Plaintiff walked out. The next day the plaintiff talked to his wife, saying, "You straighten up or you're going to have to get out." She replied, "I am not going any place. You get out. I got what I need." The plaintiff moved from the residence and the

parties have been living separate and apart since that time.

Plaintiff stated that approximately three months after the separation he offered to take defendant back, but she refused to return. Within the one year period however defendant began telephoning plaintiff, asking him to take her back. The plaintiff testified that she "asked to come back regular" after "Frank" left and that she made about five such requests and all of them were refused. In January 1963 the defendant moved to California, where she now resides.

On the day of the trial, without prior notice to the defendant, plaintiff moved to amend his complaint to include a charge of adultery in addition to desertion. The court stated that the motion would be granted on condition that the defendant be given time to answer and prepare her defense. Plaintiff refused these terms and elected to proceed to trial solely on the ground of desertion. After the court pronounced its finding against the plaintiff on that ground, he renewed his motion to amend the complaint to include adultery, arguing that the amendment would merely conform the pleadings to the proof. The court again denied the motion.

Proceeding to a considertion of plaintiff's first point, that the court erred in not granting him a divorce on the ground of desertion, the Divorce Act (Ill. Rev. Stat., ch. 40, §1 (1965)) requires that the plaintiff must establish that the defendant wilfully remained away from him without reasonable cause for the space of one year. A good faith offer to return on the part of the offending spouse made during the statutory period stems the continuity of the period of desertion. The offended spouse must hold the door open for repentance and return during the statutory period and receive back the offending spouse if the latter

offers in good faith to return. Albee v. Albee, 141 Ill. 550, 31 N.E. 153; Hilliard v. Hilliard, 25 Ill. App. 2d 468, 167 N.E. 451. Plaintiff's own testimony established the fact that the defendant made offers to return. The only evidence as to the dubious nature of those offers was plaintiff's personal conclusion that they were not made in good faith. No other evidence supports that assumption. On the other hand, the record shows that the offers were repeatedly made at a time when the defendant apparently had ceased any companionship with "Frank." Under the evidence presented, the trial court properly found that the offers to return were made in good faith.

We turn now to a consideration of the court's denial of plaintiff's motion to amend the pleadings to conform to the proof. Amendments may be allowed at any time before final judgment on "just and reasonable terms." Ill. Rev. Stat., ch. 110, §46(1) (1965). Parties do not have an absolute right to amend. Deasey v. City of Chicago, 412 Ill. 151, 105 N.E.2d 727. The only evidence before the court amounting to adultery on the part of defendant is plaintiff's assumption that she was living with another man. No evidence of any character other than plaintiff's inference was presented which tended to show adulterous conduct on the part of defendant. Plaintiff testified that on occasions he saw his wife in their car and in his place of business with "Frank." In order to establish adultery, proof of the clearest and most convincing character must be offered that the actual carnal act of adultery was committed. Hoef v. Hoef, 323 Ill. 170, 153 N.E. 658; Fowler v. Fowler, 315 Ill. App. 270, 42 N.E.2d 954. The court properly denied plaintiff's motion to amend.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and SULLIVAN, J. concur.

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MARTIN KLEIN, Plaintiff-Appellant, v. LORRAINE PRIEST, Defendant-Appellee.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO, FIRST MUNICIPAL DISTRICT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating an ex parte judgment based upon a petition filed under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1965, chap. 110, section 72), which petition was filed more than thirty days after the entry of the judgment.

The appellant has filed his brief and argument, together with excerpts from record, and has complied with all of the requirements of the statute, as well as the rules of this court. Appellee has not filed a brief or an argument in an effort to sustain the order.

Where this condition of the record exists the judgment or order may be reversed without consideration of the cause on its merits. Parkside Realty Co. v. License Appeal Commission of the City of Chicago, et al., 87 Ill. App. 2d 374; Ogradney v. Daley, 60 Ill. App. 2d 82; 541 Briar Place Corp. v. Harman, 46 Ill. App. 2d 1; C.I.T. Corporation v. Blackwell, 281 Ill. App. 504.

The order appealed from is reversed.

ORDER REVERSED

DEMPSEY, P.J. and SCHWARTZ, J. concur.